

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 18, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHARLES T.,

Plaintiff,

v.

ANDREW M. SAUL,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:19-CV-0263-JTR

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 13, 18, 19. Attorney Dana C. Madsen represents Charles T. (Plaintiff); Special Assistant United States Attorney Joseph J. Langkamer represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

JURISDICTION

Plaintiff filed an application for Supplemental Security Income in 2016, alleging disability since January 1, 2007, due to panic disorder and anxiety disorder. Tr. 175, 199. At the time of the administrative hearing, Plaintiff amended the alleged onset date to October 18, 2016, the protective filing date of

1 his disability application. Tr. 15-16. The application was denied initially and upon
2 reconsideration. Administrative Law Judge (ALJ) Lori L. Freund held a hearing
3 on July 12, 2018, Tr. 12-52, and issued an unfavorable decision on September 21,
4 2018, Tr. 796-806. The Appeals Council denied Plaintiff's request for review on
5 May 31, 2019. Tr. 1-6. The ALJ's September 2018 decision thus became the final
6 decision of the Commissioner, which is appealable to the district court pursuant to
7 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review on July 29, 2019.
8 ECF No. 1.

9 **STATEMENT OF FACTS**

10 Plaintiff was born on May 24, 1969, Tr. 33, and was 47 years old on the
11 amended alleged disability onset date, October 18, 2016, Tr. 16. He completed
12 one year of college and has past work as a cook and as a stocker. Tr. 33, 200.
13 Plaintiff's disability report indicates he stopped working on May 1, 2001, because
14 he was incarcerated and his condition became severe enough to keep him from
15 working on January 1, 2007. Tr. 199. Plaintiff testified at the administrative
16 hearing on July 12, 2018, that he had not attempted to look for work since he was
17 released from incarceration in August of 2016, Tr. 27, and did not believe he was
18 capable of performing any work, even a job where he was not required to work
19 with the public or others, Tr. 32.

20 Plaintiff stated he had not been diagnosed with any physical conditions since
21 2016. Tr. 29. However, he had complained of pain and swelling in his hands, with
22 use, since 2012. Tr. 40-42. He indicated his disability stemmed from symptoms of
23 anxiety and panic attacks, which he experienced daily. Tr. 29-30, 35-36, 199. He
24 stated he was stressed out, overwhelmed, and scared to be around people. Tr. 27.
25 At the time of the administrative hearing, Plaintiff was attending counseling, Tr.
26 27-28, 38, and had been taking different medications for his mental health
27 symptoms since 2007, Tr. 31, 33-34. He testified his current medication,
28 Venlafaxine, helped his anxiety symptoms and panic. Tr. 34.

1 Plaintiff stated that during a regular day he watched television, listened to
2 music, and visited with his sister and/or his mother. Tr. 28. He occasionally read
3 and performed household chores such as vacuuming, doing laundry, cooking by
4 microwave, and shopping (typically with his mother). Tr. 28, 36. He testified he
5 also had friends with whom he communicated by phone, and he played solitaire on
6 a computer, both alone and with his brother-in-law. Tr. 38, 40.

7 STANDARD OF REVIEW

8 The ALJ is responsible for determining credibility, resolving conflicts in
9 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
10 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
11 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
12 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed
13 only if it is not supported by substantial evidence or if it is based on legal error.
14 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
15 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
16 1098. Put another way, substantial evidence is such relevant evidence as a
17 reasonable mind might accept as adequate to support a conclusion. *Richardson v.*
18 *Perales*, 402 U.S. 389, 401 (1971). If the evidence is susceptible to more than one
19 rational interpretation, the Court may not substitute its judgment for that of the
20 ALJ. *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of Social Sec. Admin.*,
21 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the
22 administrative findings, or if conflicting evidence supports a finding of either
23 disability or non-disability, the ALJ's determination is conclusive. *Sprague v.*
24 *Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision
25 supported by substantial evidence will be set aside if the proper legal standards
26 were not applied in weighing the evidence and making the decision. *Browner v.*
27 *Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

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SEQUENTIAL EVALUATION PROCESS

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of proof rests upon the claimant to establish a prima facie case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes that a physical or mental impairment prevents the claimant from engaging in past relevant work. 20 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show (1) the claimant can make an adjustment to other work; and (2) the claimant can perform specific jobs that exist in the national economy. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (9th Cir. 2004). If a claimant cannot make an adjustment to other work in the national economy, the claimant will be found disabled. 20 C.F.R. § 416.920(a)(4)(v).

ADMINISTRATIVE DECISION

On September 21, 2018, the ALJ issued a decision finding Plaintiff was not disabled as defined by the Social Security Act.

At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since October 18, 2016, the alleged disability onset date. Tr. 798.

At step two, the ALJ determined Plaintiff had the severe impairment of panic disorder with anxiety. Tr. 798.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. Tr. 799.

The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found Plaintiff could perform a full range of work at all exertional levels but with the following nonexertional limitations: he needs to work away from the general public, but can tolerate superficial interaction with coworkers and supervisors,

1 however, no tandem tasks can be performed; he can tolerate no over the shoulder
2 type supervision, that is, he can be shown how to perform a task and then left to his
3 own devices to perform that task; he should avoid fast-paced or timed production
4 work; and he is capable of responding appropriately to occasional changes in the
5 work setting. Tr. 800.

6 At step four, the ALJ found Plaintiff was not able to perform any past
7 relevant work. Tr. 804.

8 At step five, the ALJ determined that, based on the testimony of the
9 vocational expert, and considering Plaintiff's age, education, work experience, and
10 RFC, Plaintiff was capable of making a successful adjustment to other work that
11 exists in significant numbers in the national economy, including the jobs of
12 collator, retail marker, and stock checker. Tr. 804-805.

13 The ALJ thus concluded Plaintiff was not under a disability within the
14 meaning of the Social Security Act at any time from October 18, 2016, the alleged
15 disability onset date, through the date of the ALJ's decision, September 21, 2018.
16 Tr. 805-806.

17 ISSUES

18 The question presented is whether substantial evidence supports the ALJ's
19 decision denying benefits and, if so, whether that decision is based on proper legal
20 standards.

21 Plaintiff raises the following issues for review: (1) Did the ALJ improperly
22 discredit Plaintiff's symptom claims; (2) Did the ALJ fail to properly consider and
23 weigh the opinion evidence; (3) Are the errors harmless and/or result in ancillary
24 error; and (4) What is the proper remedy? ECF No. 13 at 13; ECF No. 18 at 3.

25 DISCUSSION

26 A. Plaintiff's Symptom Testimony

27 Plaintiff argues the ALJ erred by discrediting his symptom claims. ECF No.
28 13 at 13-14; ECF No. 18 at 3-6.

1 It is the province of the ALJ to make credibility determinations. *Andrews*,
2 53 F.3d at 1039. However, the ALJ's findings must be supported by specific
3 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
4 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
5 testimony must be "specific, clear and convincing." *Lester v. Chater*, 81 F.3d 821,
6 834 (9th Cir. 1996). "General findings are insufficient: rather the ALJ must
7 identify what testimony is not credible and what evidence undermines the
8 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915,
9 918 (9th Cir. 1993).

10 In this case, the ALJ found Plaintiff's medically determinable impairments
11 could reasonably be expected to cause the alleged symptoms; however, Plaintiff's
12 statements concerning the intensity, persistence and limiting effects of those
13 symptoms were not entirely consistent with the medical and other evidence of
14 record. Tr. 801. The ALJ stated that while Plaintiff is certainly limited in
15 functioning to some degree, it was not to the degree Plaintiff alleged. Tr. 804.

16 The ALJ first found the evidence of record demonstrated Plaintiff was not as
17 limited as asserted. Tr. 801-804. An ALJ may discount a claimant's allegations if
18 they conflict with the medical evidence of record. *Carmickle v. Comm'r Soc. Sec.*
19 *Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008); *Lingenfelter v. Astrue*, 504 F.3d
20 1028, 1040 (9th Cir. 2007) (an ALJ may consider whether alleged symptoms are
21 consistent with the medical evidence).

22 Plaintiff contends the record reflects the existence of his disabling anxiety
23 and panic attacks over a long period of time. ECF No. 13 at 14. Plaintiff's
24 opening brief indicates that records from June 9, 2008 to the time of his release
25 from the Special Commitment Center in 2016, from his medical provider at Unify
26 Clinic, from his counselors at Frontier Behavioral Health, and from his
27 examination by Kayleen Islam-Zwart, Ph.D., corroborate his testimony concerning
28 the frequency and description of his anxiety and panic. ECF No. 13 at 13-14.

1 The ALJ noted Plaintiff underwent psychotherapy and engaged in primary
2 care encounters for his mental health impairments, beginning prior to the
3 application date and continuing throughout the relevant time period. Tr. 802. The
4 ALJ agreed that Plaintiff had the severe impairment of panic disorder with anxiety,
5 Tr. 798; however, she found that Plaintiff, with this severe impairment, could still
6 perform work away from the general public, as long as the work was not fast-paced
7 and did not require tandem tasks or over the shoulder supervision, Tr. 800.

8 Plaintiff testified at the administrative hearing that he was stressed out,
9 overwhelmed, and scared to be around people. Tr. 27. He stated he did not
10 believe he was capable of performing any work, even a job where he was not
11 required to work with the public or others, because he would “get so stressed out
12 that [he was] going to have [a] heart attack.” Tr. 32. However, contrary to
13 Plaintiff’s testimony, the ALJ cited the opinion of medical expert Marian Martin,
14 Ph.D., who testified the record demonstrated only mild to moderate mental health
15 symptoms, Tr. 23-24, given Plaintiff’s panic disorder was in remission, such that
16 Plaintiff discontinued medication for some period, Tr. 19-20, and that Plaintiff had
17 learned coping strategies to manage his impairments, Tr. 20, 24. Tr. 802. The ALJ
18 also assigned weight to the opinions expressed by state agency medical consultants
19 Jan L. Lewis, Ph.D., and Dan Donahue, Ph.D., that Plaintiff could perform work
20 with limited social interaction. Tr. 60, 72, 803. The ALJ accorded “some weight”
21 to the pre-onset date¹ report of Kayleen Islam-Zwart, Ph.D., as well. Tr. 284-291,
22 803-804. Despite Plaintiff’s contention that Dr. Islam-Zwart substantiates
23 Plaintiff’s assertion that he is disabled, *see infra*, Dr. Islam-Zwart’s report notes
24 normal findings on mental status exam, Tr. 287, 290-291, and only moderate
25 restrictions, not marked or severe, with respect to Plaintiff’s abilities to perform
26

27 ¹*See Fair v. Bowen*, 885 F.2d 597, 600 (9th Cir. 1989) (medical opinions
28 that predate the alleged onset of disability are of limited relevance).

1 basic work activity, Tr. 285. Furthermore, the ALJ indicated the record during the
2 relevant period consistently reflected Plaintiff was oriented in all spheres or within
3 normal cognitive limits, Tr. 297, 300, 316-317, 733, 788, and was described as
4 cooperative, pleasant, or exhibited a normal mood and affect, and/or normal
5 behavior, in multiple care encounters, Tr. 298, 300, 317, 329-331, 733, 789. Tr.
6 802.

7 Based on the foregoing, the medical record does not align with Plaintiff's
8 allegations of completely disabling mental health symptoms in this case.
9 Consequently, the Court finds the ALJ's conclusion that Plaintiff was not as
10 limited as he alleged is properly supported.

11 The ALJ next noted Plaintiff's mental health symptoms improved with
12 medication management. Tr. 801. The ALJ held that Plaintiff's mental health
13 impairments were managed with medications such as Effexor (Venlafaxine),² Tr.
14 296-298, 318, and Ativan, Tr. 728. Tr. 801.

15 The effectiveness of medication in alleviating pain and other symptoms is a
16 relevant factor to consider in evaluating the severity of a claimant's symptoms, 20
17 C.F.R. § 416.929(c)(3)(iv), and an ALJ may rely on the effectiveness of treatment
18 to find a plaintiff's testimony unpersuasive, *see Morgan v. Comm'r of Social Sec.*
19 *Admin.*, 169 F.3d 595, 600 (9th Cir. 1999) (an ALJ may properly rely on a report
20 that a plaintiff's mental symptoms improved with the use of medication); *Odle v.*
21 *Heckler*, 707 F.2d 439, 440 (9th Cir. 1983) (noting impairments that are controlled
22 by medication cannot be considered disabling).

23 Plaintiff's opening briefs fail to specifically challenge this reason provided
24 by the ALJ for discounting Plaintiff's subjective complaints. *See Carmickle*, 533
25 F.3d at 1161 (the Court will not ordinarily consider matters on appeal that were not
26

27 ²Plaintiff also testified at the administrative hearing his current medication,
28 Venlafaxine, had helped with his anxiety symptoms and panic. Tr. 34.

1 specifically and distinctly argued in a party's opening brief). Because the Court
2 will not consider claims that are not specifically and distinctly argued in an
3 opening brief, any contention that the ALJ erred by discrediting Plaintiff's
4 subjective complaints based on the effectiveness of his medication is deemed
5 waived.

6 Finally, the ALJ noted certain activities of Plaintiff were inconsistent with
7 his allegations and showed he was instead capable of performing the assessed
8 RFC. Tr. 801-802.

9 It is well-established that the nature of daily activities may be considered
10 when evaluating credibility. *Fair*, 885 F.2d at 603. For daily activities to discount
11 subjective symptom testimony, the activities do not need to be equivalent to full-
12 time work; it is sufficient that a claimant's activities "contradict claims of a totally
13 debilitating impairment." *See Molina v. Astrue*, 674 F.3d 1104, 1112-1113 (9th
14 Cir. 2012). A claimant, however, need not be completely incapacitated to receive
15 disability benefits, and the completion of certain routine activities is insufficient to
16 discount subjective symptom testimony. *Id.* at 1112-1113 (noting that a "claimant
17 need not vegetate in a dark room in order to be eligible for benefits" (quotation
18 marks omitted)); *Benecke v. Barnhart*, 379 F.3d 587, 594 (9th Cir. 2004).

19 As documented by the ALJ, and contrary to Plaintiff's assertions of
20 disabling social anxiety, Plaintiff was able to travel to Las Vegas by plane to visit
21 his sister,³ Tr. 50, 331, and had been leaving his home more often to spend time
22 with his girlfriend and other friends, Tr. 329, 332, 779. Tr. 801. It appears proper
23 for the ALJ to have noted these reported activities as inconsistent with Plaintiff's
24 symptom complaints. However, even if it were improper for the ALJ to find
25

26 ³The Court notes Plaintiff reported to a physician assistant on August 10,
27 2017, that "he had been doing a lot of flying towards the end of the month." Tr.
28 785.

1 Plaintiff's social activities inconsistent with his testimony, *see Fair*, 885 F.2d at
2 603 (noting one does not need to be "utterly incapacitated" in order to be disabled),
3 the Court would find this error harmless given the ALJ's other supported reasons
4 for finding Plaintiff less than fully credible (*see supra*). *Carmickle*, 533 F.3d at
5 1163 (upholding adverse credibility finding where ALJ provided four reasons to
6 discredit claimant, two of which were invalid); *Batson v. Comm'r, Soc. Sec.*
7 *Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (affirming credibility finding where
8 one of several reasons was unsupported by the record).

9 The ALJ is responsible for reviewing the evidence and resolving conflicts or
10 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
11 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
12 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in
13 determining whether the ALJ's decision is supported by substantial evidence and
14 may not substitute its own judgment for that of the ALJ even if it might justifiably
15 have reached a different result upon *de novo* review. 42 U.S.C. § 405(g). After
16 reviewing the record, the Court finds the ALJ provided clear and convincing
17 reasons, which are fully supported by the record, for finding Plaintiff's symptom
18 allegations were not entirely credible in this case.

19 **B. Medical Opinion Evidence**

20 Plaintiff contends the ALJ also erred by relying on the opinion of non-
21 examining, non-treating doctors, and discounting the examining opinion of
22 Kayleen Islam-Zwart, Ph.D., the findings of counselors at Frontier Behavioral
23 Health, and the opinions of medical professionals who treated and examined
24 Plaintiff at the Special Commitment Center. ECF No. 18 at 6-9.

25 In a disability proceeding, the courts distinguish among the opinions of three
26 types of acceptable medical sources: treating physicians, physicians who examine
27 but do not treat the claimant (examining physicians) and those who neither
28 examine nor treat the claimant (nonexamining physicians). *Lester*, 81 F.3d at 830.

1 A treating physician's opinion carries more weight than an examining physician's
2 opinion, and an examining physician's opinion is given more weight than that of a
3 nonexamining physician. *Benecke*, 379 F.3d at 592; *Lester*, 81 F.3d at 830. In
4 weighing the medical opinion evidence of record, the ALJ must make findings
5 setting forth specific, legitimate reasons for doing so that are based on substantial
6 evidence in the record. *Magallanes*, 881 F.2d at 751.

7 Plaintiff argues Dr. Islam-Zwart's pre-onset date examining opinion,
8 combined with other information of record, supports a finding that he was more
9 limited from a mental health standpoint, than as determined by the ALJ. ECF No.
10 18 at 6-9. While Plaintiff contends the "diagnosis and opinions" of the doctors
11 who examined and treated Plaintiff at the Special Commitment Center and the
12 records of the Unify Community Clinic (specifically the opinion of treating
13 practitioner Nathan Lee, PA-C) "are the same as the findings of Kayleen Islam-
14 Zwart, PhD, and the same as the findings of [Plaintiff's] counselors at Frontier
15 Behavioral Health," ECF No. 18 at 7, 8, Plaintiff has not specifically described
16 any functional limitations from these medical records, or others, that were not
17 accounted for in the ALJ's RFC determination. Plaintiff has failed to identify any
18 specific errors in the ALJ's analysis of the evidence. *See Matthews v. Shalala*, 10
19 F.3d 678, 680 (9th Cir. 1993) ("the mere existence of an impairment is insufficient
20 proof of a disability."); *Edlund v. Massanari*, 253 F.3d 1152, 1159-1160 (9th Cir.
21 2001) (a claimant must prove an impairment affects his ability to perform basic
22 work activities).

23 As discussed above, the ALJ assigned weight to the opinions of medical
24 expert Martin and state agency medical consultants Lewis and Donahue, as well as
25 "some weight" to the report of Dr. Islam-Zwart. Tr. 802-804. Drs. Martin, Lewis
26 and Donahue opined that Plaintiff could perform work with certain social
27 interaction restrictions. Tr. 23-24, 60, 72. Dr. Islam-Zwart's report notes normal
28 findings on mental status exam, Tr. 287, 290-291, and only moderate restrictions,

1 not marked or severe, with respect to Plaintiff's abilities to perform basic work
2 activity, Tr. 285. Moreover, medical records during the relevant time period
3 reflected Plaintiff was oriented in all spheres or within normal cognitive limits, Tr.
4 297, 300, 316-317, 733, 788, and was described as cooperative, pleasant, or
5 exhibited a normal mood and affect, and/or normal behavior, in multiple care
6 encounters, Tr. 298, 300, 317, 329-331, 733, 789. Tr. 802.

7 Based on the foregoing, the Court finds that the ALJ did not err by failing to
8 find greater mental health limitations than as assessed in the RFC determination.

9 **C. RFC Assessment**

10 Plaintiff contends had Plaintiff's symptom claims and the opinion evidence
11 of record been properly considered, Plaintiff's RFC determination would be
12 assessed differently, affecting the ultimate determination regarding disability in
13 this matter. ECF No. 13 at 16; ECF No. 18 at 9.

14 As determined above, the ALJ did not err by finding Plaintiff's symptom
15 allegations were not entirely credible and by assessing the medical evidence and
16 concluding Plaintiff could perform work with certain social interaction restrictions.
17 As such, the ALJ's RFC determination is supported by the weight of the record
18 evidence and free of error.

19 At the administrative hearing, the vocational expert testified that with the
20 restrictions assessed by the ALJ, Plaintiff retained the capacity to perform a
21 significant number of jobs existing in the national economy, including the
22 positions of collator, retail marker, and stock checker. Tr. 46-47, 805. Since the
23 vocational expert's testimony was based on a properly supported RFC
24 determination by the ALJ, the Court finds the ALJ did not err at step five of the
25 sequential evaluation process in this case.

26 **CONCLUSION**

27 As determined above, the ALJ did not err by finding Plaintiff's symptom
28 allegations were not entirely credible, and Plaintiff has not demonstrated any error

1 with respect to the ALJ's evaluation of the medical evidence of record. As such,
2 the Court finds the ALJ's decision should be affirmed. Therefore, **IT IS**

3 **HEREBY ORDERED:**

4 1. Defendant's Motion for Summary Judgment, **ECF No. 19**, is
5 **GRANTED.**

6 2. Plaintiff's Motion for Summary Judgment, **ECF No. 13 & 18**, is
7 **DENIED.**

8 **IT IS SO ORDERED.** The District Court Executive is directed to file this
9 Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall
10 be entered for Defendant and the file shall be **CLOSED.**

11 DATED September 18, 2020.



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A handwritten signature in black ink, consisting of a stylized 'M' followed by a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE